

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

WILLIAM EARL BINGLEY,

Defendant-Appellee.

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UNPUBLISHED

February 15, 2011

No. 292227

Wayne Circuit Court

LC No. 06-003518-FC

Before: FITZGERALD, P.J., and MARKEY and BECKERING, JJ.

PER CURIAM.

Defendant was charged with six counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a), for engaging in sexual penetration with his girlfriend's daughter between 2002 and December 2005. The prosecutor appeals by right the trial court's order granting defendant's motion to dismiss on the basis of double jeopardy. The prosecutor also challenges the trial court's order denying the prosecutor's motion to disqualify the trial judge. We reverse and remand for further proceedings.

The prosecution originally charged defendant in 2006 with penetrating the victim's vagina with his finger or an object between 2002 and December 2005. On October 24, 2008, just three days before the scheduled date of trial, the prosecutor filed a delayed notice of intent to offer evidence under MCL 768.27a that defendant also had the victim to perform fellatio. The prosecutor represented in court on the day the trial was to start and in the written notice that he first learned of the alleged fellatio during an interview with the victim on the day the notice was filed. Defense counsel objected to the evidence on the basis that the prosecutor had not established good cause for the late notice. The trial court was not satisfied that good cause for the late notice had been shown and ruled that the proposed evidence would not be admissible, although the court indicated it might reconsider its ruling during the trial if other information came to light. However, the trial was adjourned to facilitate a defense discovery request for the victim's school counseling records, and then again adjourned to March 30, 2009.

On December 4, 2008, the prosecutor submitted a motion for reconsideration of the trial court's ruling regarding the other acts evidence. The prosecutor again noted the victim first disclosed the fellatio incident to him in October, and that "was the first time the prosecution learned of this allegation." The prosecutor argued that because the trial had been adjourned, the

15-day notice requirement of MCL 768.27a was satisfied. Although defense counsel filed written objections, he later withdrew them, apparently as a matter of trial strategy, believing that the victim's late disclosure of the fellatio incident would strengthen the defense that all the victim's allegations were a fabrication.

At trial, the testimony of the victim's mother was inconsistent. She testified that it was sometime in 2008 when the victim first revealed that defendant had her perform fellatio. Then she testified the victim disclosed this around the time of the investigator's interview before charges were issued, which occurred in February 2006. Then she said it was in May 2006, after the preliminary examination. The victim's mother also testified she did not inform the prosecutor of the allegation until October 2008. On redirect examination, the prosecutor attempted to rehabilitate the mother's testimony regarding the timeline of events. Through leading questions, the victim's mother acknowledged that she told the prosecutor at the time of the February 2006 interview about the fellatio allegation.

Defendant moved for a mistrial on the grounds that the prosecutor intentionally misrepresented when he first learned of the fellatio allegation, that defendant had relied on the prosecutor's misrepresentation when he agreed not to oppose the evidence, and that defendant was prejudiced by the new revelation that the victim first disclosed the fellatio allegation in February 2006, because its effect was to undercut his fabrication defense. The trial court initially denied the motion and directed the parties to devise a limiting instruction it could give to the jury. After the parties were unable to craft a curative instruction, and the prosecutor noted he could not object to the defendant's motion for a mistrial, the trial court granted it.

Defendant later filed a motion to dismiss in which he argued that a retrial was barred by double jeopardy because of the prosecutor's misconduct. The trial court determined that the prosecutor's "actions were intentional to achieve a mistrial." Although the prosecution disagreed with the trial court's finding, it agreed that the finding justified dismissal with prejudice.

On appeal, plaintiff argues that the trial court erred in dismissing this case on double jeopardy grounds. Whether double jeopardy bars a new trial in this case presents an issue of law that this Court reviews de novo on appeal. *People v Smith*, 478 Mich 292, 298; 733 NW2d 351 (2007). The United States and Michigan Constitutions both preclude double jeopardy. US Const, Am V; Const 1963, art 1, § 15. When a defendant is tried by a jury, jeopardy attaches at the time the jury is selected and sworn. *People v Dawson*, 431 Mich 234, 251; 427 NW2d 886 (1988). "Where the trial ends before a verdict—where a mistrial is declared—the Double Jeopardy Clause may bar a retrial." *Id.* But the Double Jeopardy Clause does not bar all retrials. When the defendant moves for or consents to a mistrial "and the mistrial was caused by innocent conduct of the prosecutor or judge, or by factors beyond their control, or by defense counsel himself," a retrial is generally permitted on the theory that by making or consenting to the motion the defendant waives a double jeopardy claim. *Dawson*, 431 Mich at 253. An exception to the general rule that a defendant's motion for mistrial waives the protection of double jeopardy exists "where prosecutorial conduct was intended to provoke the defendant into moving for a mistrial." *Id.* A defendant who has sought or consented to a mistrial who later invokes this exception to prevent a new trial must establish the prosecutor's intent from the objective facts and circumstances of the particular case. *Oregon v Kennedy*, 456 US 667, 675 (REHNQUIST, C.J.), 680 (POWELL, J., concurring); 102 S Ct 2083; 72 L Ed 2d 416 (1982); *Dawson*, 431 Mich

at 257. The trial court's determination regarding the prosecutor's intent is a factual finding that this Court reviews for clear error. *Oregon v Kennedy*, 456 US at 675; *Dawson*, 431 Mich at 258.

We conclude the trial court clearly erred in its findings of fact because the objective facts and circumstances of this case do not establish that the prosecutor intentionally provoked defendant into moving for a mistrial. There is no doubt that the prosecutor engaged in misconduct by misrepresenting the date on which the prosecution first learned about the victim's fellatio allegation. "Prosecutorial conduct that might be viewed as harassment or overreaching, even if sufficient to justify a mistrial on defendant's motion . . . does not bar retrial absent intent on the part of the prosecutor to subvert the protections afforded by the Double Jeopardy Clause." *Oregon v Kennedy*, 456 US at 675-676. Here, the objective facts and circumstances do not support a finding that the prosecutor intended to provoke defendant into moving for a mistrial by introducing evidence about when the victim disclosed the fellatio allegation that was contrary to what he had represented. Indeed, the trial court originally declined to order a mistrial, and instead ordered the parties to prepare an appropriate limiting instruction that would not affect defendant's ability "to argue inconsistencies in the testimony." Even if the objective circumstances support finding that the prosecutor intended to gain a tactical advantage at trial, they do not support finding the prosecutor intended to goad or provoke defendant into moving for a mistrial. The trial court did not find and the objective circumstances do not support that the prosecution gained some advantage by having a mistrial declared. We therefore conclude that the trial court erred in dismissing this case on the basis of the Double Jeopardy Clause.

Regarding the issue of judicial disqualification, it appears from plaintiff's contention that it cannot expect to receive a fair trial on remand that this issue is limited to the judge's ability to preside over the case in the event of a retrial. We conclude that the judge's remarks regarding the prosecutor's conduct, made while she was surreptitiously being recorded by the prosecutor during a recess, were not such as to warrant a finding that the court displayed such deep-seated favoritism or antagonism that she could not exercise fair judgment in a retrial of this case. *Cain v Dep't of Corrections*, 451 Mich 470, 496; 548 NW2d 210 (1996).

We reverse and remand for further proceedings. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald

/s/ Jane E. Markey